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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 728

ERNEST HENNINGER, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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No.

ERNEST HENNINGER, Petitioner,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled case on September 16, 1965.

OPINION BELOW

The opinion of the Tenth Circuit Court of Appeals, printed in Appendix B hereto, infra. p. 6, is reported in 350 Fed. 2d 849.

JURISDICTION

The judgment of the Court of Appeals was entered on September 16, 1965 (Appendix B). A petition for rehearing was denied on October 8, 1965 (Appendix C). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED

Whether a person obtaining a loan accepted by the Federal Housing Administration is guilty of a felony in violation of 18 U.S.C. Section 1010, even though there is no proof that the government relied on any statements made in a false application and notwithstanding the fact that reliance by the government or any other institution or person is in no way considered a requirement of conviction and in spite of the fact that the statements did not result in defrauding the government or anyone else.

STATUTE INVOLVED

The statutory provision involved is 18 U.S.C. Section 1010 and is printed in Appendix A, infra. p. 5.

CONSTITUTION INVOLVED

Amendment V:

". . . nor shall any person . . . be deprived of life, liberty or property, without due process of law . . ."

STATEMENT

Petitioner was found guilty after trial to a jury upon each of three counts of an information charging violations of 18 U.S.C. Section 1010. The jurisdiction of the district court was invoked because the case arises under 18 U.S.C. Section 1010.

The government offered evidence of petitioner having made false statements in applications for Title 1, F.H.A. home improvement loans.

The Court of Appeals in its opinion, Appendix B, infra. p. 6, affirmed the judgment on the basis of the holdings in *Cohen* v. *United States,* 6 Cir., 178 F. 2d 588, Cert. denied, 339 U.S. 920; *Bins* v. *United States,* 5 Cir., 331 F. 2d 390, Cert. denied, 379 U.S. 880; *Brilliant* v. *United States,* 8 Cir., 297 F. 2d 385, Cert. denied, 369 U.S. 871; *United States* v. *Pesano,* 2 Cir., 293 F. 2d 229.

REASONS FOR GRANTING THE WRIT

The United States Supreme Court has consistently denied certiorari in this type of case, and it is now necessary for the government to prove no more than a false statement with intent to influence the Federal Housing Administration. The statements do not have to have any influence on the Federal Housing Administration or upon anyone else.

This law, in effect, denies the accused the right to establish as a defense that the statements were mere formalities and in no way resulted in defrauding the United States or any other entity or person.

As Justice William O. Douglas stated: "Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat. Where discretion is absolute, man has always suffered. At times it has been his property that has been invaded; at times, his privacy; at times, his liberty of movement; at times, his freedom of thought; at times, his life. Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions." *United States* vs. *Wunderlich*, 342 U.S. 98, dissenting opinion at 101.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Title 18 U.S.C. Section 1010

"Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by such Administration, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of such Administration, makes, passes, utters, or publishes any statement, knowing the same to be false, or alters, forges, or counterfeits any instrument, paper, or document, or utters, publishes, or passes as true any instrument, paper, or document, knowing it to have been altered, forged, or counterfeited, or willfully overvalues any security, asset, or income, shall be fined not more than $5,000 or imprisoned not more than two years, or both."

APPENDIX B

OPINION

Appeal from the United States District Court

for the District of Colorado

Sidney H. Tellis (Louis Boggio was with him on the brief) for Appellant.

Milton C. Branch, Assistant United States Attorney, (Lawrence M. Henry, United States Attorney, was with him on the brief) for Appellee.
Before LEWIS, BREITENSTEIN and HILL, Circuit Judges.

LEWIS, Circuit Judge.

Appellant was found guilty after trial to a jury upon each of three counts of an information charging violations of 18 U.S.C. § 1010 by making false statements in applications for Title I, F.H.A. home improvement loans. He appeals, contending that it was incumbent upon the United States to prove, as an element of the crimes, that his admittedly false statements actually influenced the Federal Housing Administration to insure the loans. The subject statute, 18 U.S.C. § 1010 provides in pertinent part:

> "Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance * * * or for the purpose of influencing in any way the action of such Administration, makes,

passes, utters, or publishes any statement, knowing the same to be false, * * * shall be fined * * * or imprisoned * * *."

The clear wording of the statute indicates that the essence of the crime lies in the making, passing, uttering, or publishing of a false application with the intent to influence the Administration and is not dependent upon the accomplishment of that purpose. *Cohen* v. *United States,* 6 Cir., 178 F_2 588, cert. denied, 339 U.S. 920; *Bins* v. *United States,* 5 Cir., 331 F_2 390, 392, cert. denied, 379 U.S. 880. The crime is one of subjective knowledge and intent and requires no defrauding of the government nor reliance upon the part of its officials. See *Brilliant* v. *United States,* 8 Cir., 297 F_2 385, 389, cert. denied, 369 U.S. 871; *United States* v. *Pesano,* 2 Cir., 293 F_2 229, 231. Appellant's contrary contention is without merit.

Although no instruction of the court was objected to, appellant now characterizes the instructions as "vague, uncertain, and erroneous." We have examined the court's charge for clear error, find none, and consider the instructions to be specific, certain and correct.

The judgment is affirmed.

APPENDIX C

Order denying petition for rehearing

Seventeenth Day, September Term,
Friday, October 8th, 1965.

Before Honorable David T. Lewis, Honorable Jean S. Breitenstein and Honorable Delmas C. Hill, Circuit Judges.

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

[On October 14, 1965, the mandate of the United States Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court for the District of Colorado.]

[An order was entered on October 25, 1965, recalling the mandate and staying it for a period of twenty days from October 25, 1965.]

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